

DISTRIBUTION AGENCY AGREEMENT

BETWEEN

ESKOM HOLDINGS SOC LTD
REGISTRATION NUMBER: 2002/015527/30

AND

MALUTI-a-PHOFUNG LOCAL MUNICIPALITY

1. PARTIES

The Parties to this Agreement are -

ESKOM HOLDINGS SOC LTD

(Registration Number: 2002/015527/30) a state-owned public company with limited liability incorporated in terms of the laws of the Republic of South Africa, with its registered office at Megawatt Park, Maxwell Drive, Sandton

(‘Eskom’) herein represented by ANDRE DE RUYTER in his capacity as GROUP CHIEF EXECUTIVE

- AND -

MALUTI-a-PHOFUNG LOCAL MUNICIPALITY

a municipality constituted in terms of the Local Government Municipal Structures Act 117 of 1998 as amended, read with the Local Government Municipal Systems Act 32 of 2000 as amended, with its registered offices at Corner Moremoholo and Motloung Streets, Phuthaditjhaba, Qwaqwa.

(‘the Municipality’), herein represented by SAM MAKHUBU in his capacity as ACTING MUNICIPAL MANAGER

2. PREAMBLE

- 2.1 The Municipality is the service authority in respect of, and has the right to administer electricity reticulation in terms of Section 156(1)(a) of the Constitution and in terms of Section 11 of the Municipal Systems Act (No 32 of 2000) and is licenced by the National Energy Regulator of South Africa to distribute and supply electricity to Customers within its licensed area of supply as set out in the Municipality's Distribution licence.
- 2.2 Eskom is presently providing the Municipality with a supply of electricity in bulk for the purpose of distribution to customers within the Municipality's licensed area of supply in terms of various Electricity Supply Agreements.
- 2.3 The parties recognize and acknowledge that:
 - 2.3.1 the Municipality is, as at 03 February 2023, currently indebted to Eskom in the total sum of R7 346 370 020,18 (seven billion three hundred and forty-six million three hundred and seventy thousand and twenty Rands and eighteen cents), and continues to be unable to meet its financial obligations to Eskom in respect of the Outstanding Debt and its Electricity Accounts;
 - 2.3.2 this Agreement is concluded pursuant to the order of the North Gauteng High Court, Pretoria under case number 2536/2019 dated 24 May 2021 issued in the form of a rule nisi which was confirmed on 8 June 2021 (“the Court order”);

- 2.3.3 this Agreement is concluded purely as a means to restore the Municipality's technical and financial sustainability that will enable the Municipality to make payment for bulk electricity supplied by Eskom as well as continue to be able to deliver electricity to its Customers as a basic service.
- 2.4 Accordingly, the Parties wish to collaborate with each other in order to:
- 2.4.1 Appoint and enable Eskom to provide Services to the Municipality with the aim of restoring the technical and financial sustainability of its electricity reticulation business and electricity revenue generation, therefore ensuring its ability to pay Eskom for past unpaid and the future cost of bulk electricity supplied by Eskom;
- 2.4.2 implement an effective Services agreement that will include an exit and handover strategy that will ensure the Municipality's financial and operational ability to provide electricity as a basic service is restored and sustained during and after the implementation of the terms of this Agreement.

3. DEFINITIONS AND INTERPRETATION

3.1 Definitions

- 3.1.1 In this Agreement, unless the context otherwise requires, the following capitalised terms shall have the meanings assigned to them below and cognate expressions shall have corresponding meanings:
- 3.1.1.1 **"Applicable Laws"** means collectively the Municipal Finance Management Act, the Municipal Systems Act, the Municipal Structures Act, Electricity Regulation Act, National Energy Regulator Act, Public Finance Management and other Laws specifically applicable to the appointment of Eskom as a service delivery agent to the Municipality;
- 3.1.1.2 **"Business Day"** means any day other than a Saturday, Sunday or public holiday in South Africa;
- 3.1.1.3 **"Contract Manager"** means the respective representatives of Eskom and the Municipality appointed and nominated from time to time with responsibility for the liaison and contract management function in respect of this Agreement;
- 3.1.1.4 **"Customer(s)"** means all consumers of electricity within the municipal licensed area of supply, as set out in the Municipality distribution licence;
- 3.1.1.5 **"Distribution Agency Agreement"** means this agreement for the Services to be provided by Eskom, including its Annexures:
- 3.1.1.5.1 Annexure 'A' Scope of Services to be Provided by Eskom and the Municipality
- 3.1.1.5.2 Annexure 'B' Rights and Responsibilities of the Parties
- 3.1.1.5.3 Annexure 'C' Contact Details
- 3.1.1.5.4 Annexure 'D' Merit Order Deductions
- 3.1.1.5.5 Annexure 'E' List of Seconded Employees
- and **"Agreement"** or **"this Agreement"** shall be construed accordingly;

- 3.1.1.6 **“Electricity Account”** means the electricity account, issued by Eskom for all charges payable, the current and overdue debt, due and owing by the Municipality to Eskom in accordance with the Electricity Supply Agreement and this Agreement;
- 3.1.1.7 **“Electricity Supply Agreement”** means the following electricity supply agreements entered into between Eskom and the Municipality in terms of which Eskom supplies the Municipality with electricity for the purpose of distribution to consumers within the Municipality’s license area of supply, dated and referenced accordingly:
- 3.1.1.7.1 15 December 1994;
- 3.1.1.7.2 09 November 1999;
- 3.1.1.7.3 05 February 2002 (Ref KEY 2002/005); and
- 3.1.1.7.4 16 August 2005;
- 3.1.1.8 **“Electricity Regulation Act” or “ERA”** means the Electricity Regulation Act 4 of 2006;
- 3.1.1.9 **“Exit Plan”** means the handover of the operation, maintenance and revenue recovery of the Municipality’s Network and electrical equipment in Eskom’s control for purposes of providing the Services and all relevant data pertaining thereto to ensure the takeover and continuation of the operation and management of the Municipality’s Network and electrical equipment, by the Municipality;
- 3.1.1.10 **“Force Majeure Event”** means any act, event or circumstance or any combination of acts, events or circumstances which:
- 3.1.1.10.1 is beyond the reasonable control of a Party affected by it (the ‘Affected Party’);
- 3.1.1.10.2 is without fault or negligence on the part of the Affected Party and is not the direct or indirect result of a breach or failure by the Affected Party to perform any of its obligations under this Agreement;
- 3.1.1.10.3 was not foreseeable or, if foreseeable, could not have been avoided or overcome by the Affected Party (including by reasonable anticipation) taking reasonable action;
- 3.1.1.10.4 prevents, hinders or delays the Affected Party in its performance of all (or part) of its obligations under this Agreement.
- Without limiting the generality of the foregoing, a Force Majeure Event may include any of the following acts, events or circumstances, but only to the extent that it satisfies the requirements set out in subclauses 3.1.1.10.1 to 3.1.1.10.4 above:
- (i) war, hostilities, belligerence, blockade, acts of terrorism, sabotage, civil commotion, riot, revolution, or insurrection occurring in South Africa;
 - (ii) any laws, decrees or regulations of governmental authorities;
 - (iii) strikes that are widespread, nationwide or political in nature (but excluding strikes, lockouts and other industrial disturbances of the Affected Party’s employees which are not part of a wider industrial dispute materially affecting other employees within South Africa);
 - (iv) drought, fire, earthquake, volcanic eruption, landslide, flood, storm, cyclone, tornado, typhoon or other natural disasters;
 - (v) epidemic or plague;

- (vi) fire, explosion, or radioactive or chemical contamination;
- (vii) air crash, shipwreck or train crash; and
- (viii) any act, event or circumstance of a nature analogous to any of the foregoing.

A Force Majeure Event does not include shortage of cash, any inability or failure to pay money, any inability to raise finance or any changes in price and market conditions or strikes, lockouts and other industrial disturbances of the Affected Party's employees which are not part of a wider industrial dispute materially affecting other employees within South Africa.

- 3.1.1.11 **"Free Basic Electricity" or "FBE"** means limited free amount of electricity supply deemed necessary to support basic energy services of an indigent household as determined by Government and contained in the indigent list to be communicated by the Municipality on a monthly basis to Eskom, in terms of the Free Basic Electricity Agreement dated 13 September 2018;
- 3.1.1.12 **"Implementation Plan"** means a plan developed for the execution and realisation of the Services, that:-
 - 3.1.1.12.1 Sets key financial and non-financial performance objectives and measurement criteria as agreed with the Municipality;
 - 3.1.1.12.2 Is consistent with the budget and Integrated Development Plan of the Municipality which must take into account the Implementation Plan; and
 - 3.1.1.12.3 Reflects actual and potential liabilities and commitments, including particulars of any proposed borrowing of money during the period to which the Implementation Plan relates.
- 3.1.1.13 **"Integrated Development Plan"** means the single, inclusive and strategic plan for the development of the Municipality as envisaged in Section 25 of the Municipal Systems Act;
- 3.1.1.14 **"LRA"** means the Labour Relations Act, 66 of 1995 as amended, including all regulations published in terms of it;
- 3.1.1.15 **"Law"** means (a) any constitution, statute, ordinance, proclamation, primary or subordinated legislation or other legislative measure, as well as the common law and customary law and any judgment, decision, interdict, order or rule of any court or tribunal with relevant jurisdiction, in each case having the force of law in South Africa and (b) any directive, requirement, instruction, request, order, regulation, condition of or limitation in any necessary Governmental authorisation, registration, grant, acknowledgement, exemption or agreement to be obtained from, or code, guideline, policy, direction or rule of a Governmental Instrumentality which is legally binding, including the Code(s).
- 3.1.1.16 **"Merit Order"** means the priority order of allocation of the revenue recovered in terms of this Agreement as set out in Annexure D.
- 3.1.1.17 **"Municipality"** means the Maluti –a-Phufong Local Municipality;
- 3.1.1.18 **"Municipal Council"** means the Municipal Council of the Municipality as envisaged in section 157 (1) of the Constitution;

- 3.1.1.19 **“Municipal Finance Management Act” or “MFMA”** means the Municipal Finance Management Act 56 of 2003, as amended, including all regulations published in terms of it;
- 3.1.1.20 **“Municipal Structures Act”** means the Local Government: Municipal Structures Act 117 of 1998, including all regulations published in terms of it;
- 3.1.1.21 **“Municipal Systems Act”** means the Local Government: Municipal Systems Act 32 of 2000, including all regulations published in terms of it;
- 3.1.1.22 **“Municipal Network”** means the existing and planned high voltage, medium voltage and low voltage networks, including prepaid smart metering and post-paid metering.
- 3.1.1.23 **“National Energy Regulator Act”** means the National Energy Regulator Act which establishes NERSA to regulate the electricity, piped gas, and petroleum pipe line industries;
- 3.1.1.24 **“NERSA”** means the National Energy Regulator of South Africa, established in terms of the National Energy Regulator Act, Act 4 of 2006, or its legal successor-in-title;
- 3.1.1.25 **“Network Maintenance Services”** means the services provided by Eskom to maintain the existing Municipal Networks as well as upgrade and/or strengthen the Municipal Networks, including the development of master plans and compliance reporting to NERSA, in accordance with the provisions of this Agreement and as set out in Annexure A (*Scope of Services to be Provided by Eskom and the Municipality*);
- 3.1.1.26 **“Occupational Health and Safety Act”** means the Occupational Health and Act 85 Of 1993;
- 3.1.1.27 **“Outstanding Debt”** means the debt of R7 346 370 020,18 (seven billion three hundred and forty-six million three hundred and seventy thousand and twenty Rands and eighteen cents), as at 03 February 2023 owed by the Municipality to Eskom for its Electricity Accounts,
- 3.1.1.28 **“Parties”** means Eskom and the Municipality and Party shall be construed accordingly;
- 3.1.1.29 **“Public Finance Management Act” or “PFMA”** means the Public Finance Management Act 1 of 1999;
- 3.1.1.30 **“Post-paid Customer”** means a customer that pays for electricity after consumption and upon receipt of an electricity account;
- 3.1.1.31 **“Revenue Collected”** means all charges payable to Eskom for the consumption of electricity pursuant to the provision of the Services by Eskom in terms of this Agreement.
- 3.1.1.32 **“Revenue Collection Services”** means preparation and issuing of existing and new customer applications for post-paid electricity accounts; execute credit and debt management functions for the municipal Customers; auditing and providing non-technical loss calculations as well as vending platforms for existing and new prepaid sales; reconciliation of all revenue collected from post-paid and prepaid sales and the payment of VAT;

- 3.1.1.33 “**Smart Meters**” means an intelligent prepaid electricity meter that allows communication between the meter, the utility, its revenue management service provider and the network itself. It further enables Customers to view when and how they are consuming electricity and thus enables the Customer to manage electricity usage;
- 3.1.1.34 “**Services**” or “**the Services**” means the Revenue Collection Services; Network Maintenance Services and Support Services that shall be provided by Eskom, in accordance with the provisions of this Agreement and Annexure A (*Scope of Services to be Provided by Eskom and the Municipality*);
- 3.1.1.35 “**Support Services**” means the services required to support Network Maintenance Services and Revenue Recovery Services, including but not limited to administration, human resources, information technology, safety, health, environmental and quality.
- 3.1.1.36 “**Value-Added Tax Act or VAT Act**” means the Value-Added Tax Act 89 of 1991;
- 3.1.1.37 “**VAT**” means the value added tax levied in terms of the VAT Act;
- 3.1.1.38 “**Vending System**” means the Eskom online vending system, which receives the credit-Vend request in real time from the Eskom vendor and deducts the Eskom vendor’s credit. It further generates new electricity credit tokens which are sent to the Eskom vendor who in turn provides it to the Customer; and
- 3.1.1.39 “**Vend or Vending**” means the selling of pre-paid electricity credit tokens to Customers.

3.2 Interpretation

- 3.2.1 This Agreement shall be interpreted according to the following provisions, unless the context requires otherwise;
- 3.2.2 references to the provisions of any law shall include such provisions as amended, re-enacted or consolidated from time to time in so far as such amendment, re-enactment or consolidation applies or is capable of applying to any transaction entered into under this Agreement;
- 3.2.3 references to “**Parties**” shall include the Parties’ respective successors-in-title and, if permitted in this Agreement, their representatives and assignees;
- 3.2.4 references to a “**person**” shall include a natural person, firm, company, corporation, juristic person, and any trust, organisation, association or partnership, whether or not having separate legal personality;
- 3.2.5 references to “**clauses**”, “**sub-clauses**” and “**Annexures**” are references to the clauses, sub-clauses and annexures of this Agreement;
- 3.2.6 references to **any other contract or document** shall include (subject to all Approvals required to be given pursuant to this Agreement for any amendment or variation to or novation or substitution of such contract or document) a reference to that contract or document as amended, varied, novated or substituted from time to time;
- 3.2.7 words in **parentheses and italics** appearing after a clause reference or a reference to a Schedule are inserted for ease of reference only;
- 3.2.8 the **headings of clauses, sub-clauses and Annexures** are included for convenience only and shall not affect the interpretation of this Agreement;

- 3.2.9 the Annexures to this Agreement are an integral part of this Agreement and references to this Agreement shall include the Annexures;
- 3.2.10 the Parties acknowledge that each of them has had the opportunity to take legal advice concerning this Agreement, and agree that no provision or word used in this Agreement shall be interpreted to the disadvantage of either Party because that Party was responsible for or participated in the preparation or drafting of this Agreement or any part of it;
- 3.2.11 words importing the singular shall include the plural and vice versa, and words importing either gender or the neuter shall include both genders and the neuter;
- 3.2.12 references to “**this Agreement**” shall include this Agreement as amended, varied, novated or substituted in writing from time to time;
- 3.2.13 the number of days indicated to commit an act or indicated for any other purpose, is calculated by excluding the first day and including the last day, unless the last day falls on a Saturday, Sunday or a public holiday, in which event the last day will be deemed to be the next Business Day;
- 3.2.14 if any definition contains a substantive provision conferring rights or imposing obligations on any Party, effect shall be given to such provision as if it was a substantive provision in the body of this Agreement.

4. COMMENCEMENT AND DURATION

- 4.1 This Agreement shall commence on the date of the last party signing in time and endure for a minimum period of 8 years and may extended to 15 years, subject to the full repayment of the Outstanding Debt as well as any other costs incurred by Eskom towards servicing the Customers of the Municipality and infrastructure, unless terminated earlier in terms of the provisions of this Agreement.
- 4.2 Should either Party want to renew this Agreement for reasons other than in 4.1, such party shall provide the other Party with 6 (six) months’ written notice of its intention to renew this Agreement and such renewal, shall be confirmed in writing by both Parties in accordance with the provisions of sub-clause 13.2 below.

5. TERMINATION

- 5.1 This Agreement shall be terminated on 6 (six) months’ written notice by either Party or in accordance with any of its termination provisions.
- 5.2 Upon termination of the Agreement:
 - 5.2.1 Eskom shall, only upon receipt of payment of the Outstanding Debt and all amounts due in terms of this Agreement, return to the Municipality the Municipal Network and all the uninstalled electrical equipment acquired for the performance of the Services and all relevant information and data pertaining to such Services;
 - 5.2.2 the Municipality shall, against payment of the Outstanding Debt and all amounts due in terms of this Agreement continue the operation and management of the Services.
- 5.3 Termination of this Agreement shall be without prejudice to the accrued rights and obligations of the Parties up to the date of such termination.

5.4 Termination of this Agreement shall not affect any clause of this Agreement which is expressly stated to survive such termination (or any other clause(s) necessary for the operation or interpretation of such clause), which clause(s) shall survive such termination and continue in full force and effect thereafter.

6. SCOPE OF SERVICES TO BE PROVIDED BY ESKOM AND THE MUNICIPALITY

6.1 The Services to be provided by Eskom are set out in Annexure A (*Scope of Services to be Provided by Eskom and the Municipality*) and may be amended by agreement between the Parties in accordance with the provisions of sub-clause 13.2 of this Agreement.

7. KEY PERFORMANCE INDICATORS AND PERFORMANCE ASSESSMENT

7.1 Eskom's key performance indicators will be set out in the Implementation Plan.

7.2 The key performance indicators will be agreed annually by the Parties, and be subject to review if so required and agreed to by the Parties.

7.3 Within 7 (seven) days of the end of each quarter of the financial year, Eskom shall prepare and submit to the Municipality a quarterly performance report reflecting:-

7.3.1 Its financial performance in rendering the Services;

7.3.2 Its achievements of the performance indicators referred to in clause 7.1;

7.3.3 Any special circumstances and factors that should be taken into account in analysing its performance; and

7.3.4 Any measures to be taken by Eskom to improve its performance.

7.4 The Municipality will regulate the provision of the Services and monitor and assess the implementation of the Agreement.

7.5 In accordance with section 41 of the Municipal Systems Act, the Municipality must in terms of its performance management system and in accordance with any regulations and guidelines that may be prescribed:-

7.5.1 Monitor performance and measure and review performance at least once per year;

7.5.2 Take steps to improve performance with regard to those development priorities and objectives where performance targets are not met; and

7.5.3 Establish a process of regular reporting by Eskom.

8. EMPLOYEES

8.1 The parties agree that Section 197 of the LRA will not apply to this Agreement.

8.2 The Municipality shall second its employees currently providing the Services, to Eskom for the duration of this agreement. A list of all the employees that shall be seconded is attached as Annexure 'E'.

8.3 Eskom, the Municipality and each employee shall conclude a secondment agreement, which will govern the terms and conditions that will be applicable for the duration of the secondment.

8.4 All seconded employees shall for the duration of their secondment to Eskom, remain employees of the Municipality and shall remain subject to the Municipalities conditions of service insofar as they relate to remuneration, employee benefits and disciplinary policies.

- 8.5 The Municipality shall remain responsible for and shall continue to pay all seconded employees' total remuneration and benefits costs in terms of their contracts of as all operational expenses, including but not limited to, travelling and subsistence expenses.
- 8.6 No fees shall be payable by Eskom for the services provided by the employees during their secondment.
- 8.7 In the event that Eskom is of the opinion that disciplinary action against any employee is justified, Eskom shall provide the Municipality with a detailed report on the alleged transgression, in which event the Municipality may, or may not, in its sole discretion, take the necessary action in accordance with its own policies and practices. Alternatively, Eskom shall be entitled to terminate the employee's secondment.
- 8.8 Eskom may appoint employees, or consultants that will not be employees of the Municipality to render some of the Service. Eskom will be liable for the payment of such employee's or contractors remuneration and benefits costs.

9. RIGHTS AND OBLIGATIONS OF THE PARTIES

- 9.1 Eskom is appointed as a service delivery agent of the Municipality and shall provide the Services in accordance with the Implementation Plan and assume its roles and responsibilities as set out in Annexure B (*Rights and Responsibilities of the Parties*) in line with the Applicable Laws as well as its governance processes.
- 9.2 The Municipality shall assume its roles and responsibilities as set out in Annexure B (*Rights and Responsibilities of the Parties*) in line with the Applicable Laws and its governance processes and shall provide the necessary cooperation to ensure the provision of the Services by Eskom.

10. INDEMNITIES

- 10.1 The Municipality hereby indemnifies Eskom against any loss, claim, demand, proceedings, damage and expense of whatever nature in respect of injury to or death of any person and or loss or damage to any property of any person resulting from or caused by the performance of the Services by Eskom in terms of this Agreement unless it can be proved that the loss or damage or injury or death was as a direct cause or action or inaction of Eskom.
- 10.2 Eskom shall not be liable for damages, expenses or costs caused to Customers arising from any disconnection and/or partial or complete Interruption and/or partial or complete reconnection of the supply of electricity, variation of voltage, variation of frequency, any failure to supply a balanced three-phase current unless the said disconnection and / or partial or complete Interruption and/or partial or complete reconnection or failure unless it is due to the negligence of Eskom;
- 10.3 Eskom shall not be liable for any damages of any nature suffered by Customers or third parties, if such damages is wholly or partly caused by the Customer's faulty electricity installation and the Municipality indemnifies Eskom against any claim by third parties as a result of damages so suffered by any third party.

11. PAYMENT FOR SERVICES PROVIDED

- 11.1 Revenue Collected in terms of this Agreement shall be deposited directly into Eskom's bank account as recorded in Annexure D and apportioned in terms of the Merit Order Deductions (Annexure D).
- 11.2 If the Revenue Collected by Eskom and any payments that may be made by the Municipality is not sufficient to cover the Outstanding Debt, Electricity Account and the Basic Charges, Eskom shall record such shortfall in the monthly reconciliation statement to be furnished to the Municipality and such amount will be accrued as payable by the Municipality to Eskom whether during or after the termination of this Agreement.

12. BREACH

- 12.1 If any Party breaches any provision or term of this Agreement and fails to remedy such breach within 7 (seven) days of receipt of written notice requiring it to do so, then the aggrieved party shall be entitled without further notice, or if it is not reasonably possible to remedy the breach within 7 (seven) days, within such further period of time as may be reasonable in the circumstances, or even if the provision or term is not material but a breach thereof has been repeated notwithstanding 3 (three) notices to remedy from the other party, in addition to any other remedy available to it at law and the dispute resolution procedure in terms of clause 17 below or under this Agreement, including obtaining an interdict, to claim specific performance or cancel this agreement, without prejudice to the aggrieved Party's right to claim damages.

13. ENTIRE AGREEMENT AND VARIATION OF TERMS AND CONDITIONS

- 13.1 This Agreement constitutes the sole and entire agreement between the Parties and supersedes all previous negotiations, arrangements or agreements in respect of the subject-matter of this Agreement.
- 13.2 Either Party, may from time-to-time request for an amendment, variation, modification, waiver, failure, delay, relaxation or indulgence of any provision of this Agreement, or consent to any departure therefrom. No such amendment, variation, modification, waiver, failure, delay, relaxation or indulgence of any provision of this Agreement, or consent to any departure shall in any way be of any force or effect unless confirmed in writing and signed by both Parties.
- 13.3 Notwithstanding any other provision to the contrary provided for herein, the terms of this clause 13 do not detract from the validity and enforceability of the:
- 13.3.1 electricity supply agreements;
- 13.3.2 acknowledgements of debt concluded in favour of Eskom; and

- 13.3.3 the terms of the order of the Free State High Court, Bloemfontein granted on 26 April 2018 interdicting and restraining Eskom from interrupting or terminating electricity supply to the Municipality and ordering that the Applicants in both cases be authorised to discharge their liability to the Municipality in respect of ongoing electricity consumption by making payment directly to Eskom and furnishing the Municipality with proof of payment, in respect of which it is specifically agreed that pending finalisation of such proceedings, Eskom shall procure the consent of the Applicants therein to ensure that the respective rights and obligations of Eskom, the Municipality and the Applicants in those applications, as provided for in the 26 April 2018 Court order, are suspended, but only for the duration of this Agreement, and shall during such suspension, instead, be governed by the terms of this Agreement.

14. CESSION AND DELEGATION OF RIGHTS AND LIABILITIES

- 14.1 Neither Party hereto shall cede and/or delegate any of its rights and/or obligations under this Agreement to any person without the written consent of the other, subject thereto that Eskom may on written notice to the MUNICIPALITY cede and/or delegate its rights and/or obligations under this Agreement to any of its subsidiaries or any of its present divisions or operations which may be converted into separate legal entities as a result of the restructuring of the electricity supply industry.

15. FORCE MAJEURE

- 15.1 If the Affected Party desires to invoke a Force Majeure Event as a cause for delay in the performance of any obligation hereunder, the Affected Party shall notify the other Party in writing setting out:
- 15.1.1 the date of commencement of the Force Majeure Event;
 - 15.1.2 the full particulars of the Force Majeure Event;
 - 15.1.3 the impact of the Force Majeure Event on the Affected Party's obligations under this Agreement;
 - 15.1.4 the Affected Party's reasonable estimate of the length of time which its performance has been and will be affected by such Force Majeure Event; and
 - 15.1.5 the steps which it is taking or intends to take or will take to remove and mitigate the adverse consequences of the Force Majeure Event on its performance hereunder;

provided that such notice (the 'Force Majeure Notice') must be sent by the Affected Party not later than 3 (three) days after the date on which the Affected Party first had knowledge of the effect of such Force Majeure Event. If the Affected Party does not deliver a Force Majeure Notice in respect of a Force Majeure Event, such Party shall not be entitled to invoke the benefits of this clause 15 in relation to such Force Majeure Event.

- 15.2 The Affected Party shall have the burden of proving both the existence of any Force Majeure Event and the effect (both as to nature and extent) which any such Force Majeure Event has on its performance.

- 15.3 If the Parties are, on the basis of the Force Majeure Notice and any supporting documentation, unable to agree as to the existence or as to the effect of a Force Majeure Event by the date falling 60 (sixty) days after the receipt by the non-Affected Party of the Force Majeure Notice, either Party shall be entitled to refer the Dispute for determination in accordance with clause 17 of this Agreement.
- 15.4 The Affected Party shall:
- 15.4.1 use reasonable endeavours to mitigate, rectify and overcome the effects of the Force Majeure Event on the performance of its obligations under this Agreement (including by recourse to alternate sources of services, equipment and materials and construction equipment);
- 15.4.2 use reasonable endeavours to ensure resumption of normal performance of this Agreement promptly following the cessation of the Force Majeure Event; and
- 15.4.3 give the other Party (i) regular reports on the progress of the mitigation measures and (ii) notice promptly on the cessation of the Force Majeure Event.
- 15.5 If it is agreed or determined that a Force Majeure Event has occurred, the Affected Party shall, provided that it has complied with the requirements of this clause 15, not be liable for any failure to perform an obligation under this Agreement as a consequence of the Force Majeure Event but only to the extent that:
- 15.5.1 such performance is prevented, hindered or delayed by a Force Majeure Event; and
- 15.5.2 such failure could not have been removed, mitigated, rectified or overcome by the Affected Party acting as a Reasonable and Prudent Operator
- 15.6 If the Affected Party's performance of all or a material part of its obligations under this Agreement is prevented, hindered or delayed by a Force Majeure Event .then, provided that the Affected Party has complied with the requirements of this clause 15, the time limits for the performance of those obligations (or any dates by which performance of those obligations are to be achieved) shall be extended by a period equal to the period by which its performance is prevented, hindered or delayed.
- 15.7 If the Force Majeure Event continues in effect for more than 90 (ninety) consecutive days, the Non-Affected Party shall have the right to terminate this Agreement after having given 14 (fourteen) calendar days written notice to the Affected Party of such termination at any time prior to the cessation of such Force Majeure Event.
- 15.8 Notwithstanding that a Force Majeure Event otherwise exists, the provisions of this clause 15 shall not excuse:
- 15.8.1 failure of either Party to make any payment of money in accordance with its obligations under this Agreement;
- 15.8.2 late delivery of equipment, machinery, plant, spare parts or materials caused by negligent conduct or wilful misconduct on the part of the Affected Party or any of its contractors;
- 15.8.3 late performance by either Party, caused by such Party's or such Party's subcontractor's failure to engage qualified subcontractors and suppliers or to hire an adequate number of personnel or labour;
- 15.8.4 mechanical or electrical breakdown or failure of equipment, machinery or plant owned or operated by either Party due to the manner in which such equipment, machinery or plant has been operated or maintained;

- 15.8.5 failure of either Party to perform any of its obligations under this Agreement in accordance with the requirements hereof prior to the occurrence of an Force Majeure Event;
- 15.8.6 delays resulting from reasonably foreseeable unfavourable weather or reasonably foreseeable unsuitable ground conditions or other similar reasonably foreseeable adverse conditions;
- 15.8.7 any failure by the Affected Party to obtain and/or maintain or cause to be obtained or and maintained any Approval, unless such failure is due to a change in Law;
- 15.8.8 strikes, lockouts and other industrial action by the employees of the Affected Party, any of its Affiliates or any contractor of the Affected Party or of any Affiliate, unless such action is part of any wider industrial action involving a significant section of the public sector, the public administration, the construction industry or the electricity supply sector;
- 15.8.9 wear and tear or random flaws in materials and equipment or breakdown in or degradation of equipment or machinery of the Affected Party.

16. CONFIDENTIALITY

- 16.1 The Parties agree that the terms of this Agreement, all information of the Parties that has been exchanged pursuant hereto, including but not limited to details concerning pricing will be received in strict confidence and not be divulged to any person, save for employees directly involved with the execution of this Agreement and be used only for the purpose of this Agreement.
- 16.2 Each Party will use the same means as it uses to protect its own confidential information, but in no event less than reasonable means, to prevent the disclosure and to protect the confidentiality of such information. No information referred to in this Agreement will be disclosed by the recipient Party, its agents, representatives or employees without the prior written consent of the other Party.
- 16.3 These provisions do not apply to information which is:
 - 16.3.1 publicly known or becomes publicly known through no unauthorised act of the recipient Party;
 - 16.3.2 rightfully received by the recipient Party from a third party;
 - 16.3.3 independently developed by the recipient Party without use of the other Party's information;
 - 16.3.4 disclosed by the other Party to a third party without similar restrictions;
 - 16.3.5 required to be disclosed pursuant to a requirement of a governmental agency or any applicable Law, so long as the Party required to disclose the information gives the other Party prior notice of such disclosure; or
 - 16.3.6 publicly disclosed with the other Party's written consent.
- 16.4 This clause 16 shall survive the termination of this Agreement.

17. DISPUTES AND DISPUTE RESOLUTION

- 17.1 The parties agree and acknowledge that any dispute arising between the Parties in regard to any matter relating to this Agreement –

- 17.1.1 the interpretation of; or
- 17.1.2 the carrying into effect of; or
- 17.1.3 any of the Parties' respective rights and obligations under; a breach of or any matter arising from this Agreement
- 17.1.4 the termination or purported termination of, or arising from the termination of; or

shall not, unless otherwise agreed in writing and signed for by both parties that the dispute so merits, be subject to the provisions of sections 40 and 41 of Constitution read with the provisions of Chapter 4 of the Intergovernmental Relations Framework Act No 13 of 2005 and or the dispute resolution mechanism contemplated in terms of the Settlement Agreement that was made an order of Court under Case Numbers 1453/2018 & 1923/2018 dated 22 October 2018 in the Free State High Court, Bloemfontein but shall be decided by arbitration as set out in this clause 17.

- 17.2 Any such Dispute shall be finally resolved by NERSA in accordance with provisions of the ERA.
- 17.3 The Parties to this Agreement may demand that a dispute be referred to arbitration by giving written notice to that effect to the other Parties.
- 17.4 This clause shall not preclude any of the Parties from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator.
- 17.5 The arbitration referred to in this clause shall be held at Eskom, Megawatt Park, Johannesburg in the English language and immediately and with a view to it being completed within 21 (twenty-one) days after it is demanded.
- 17.6 The Parties irrevocably agree that the submission of any dispute to arbitration in terms of this clause is subject to the Parties' rights of appeal. Any of the Parties may appeal the arbitration ruling by giving written notice to that effect to the other Parties within 20 (twenty) days of the ruling being handed down. The appeal shall be dealt with on such other rules as may be agreed by the Parties, by a panel of 3 (three) arbitrators agreed to by the Parties.
- 17.7 The Parties irrevocably agree that upon expiry of the 20 (twenty) day period for appeal or the handing down of the ruling of the appeal panel, as the case may be, the decision in arbitration proceedings:
 - 17.7.1.1 shall be final and binding upon the Parties;
 - 17.7.1.2 shall be carried into effect; and
 - 17.7.1.3 may be made an order of any court of competent jurisdiction.
- 17.8 The costs of any reference to arbitration will be borne by the unsuccessful Party, unless otherwise determined by the Parties or the arbitrator, irrespective of which Party referred the dispute to arbitration.
- 17.9 The parties specifically record that notwithstanding the provisions of this agreement, that the parties are aware of the provisions of the Settlement Agreement that was made an order of Court under Case Numbers 1453/2018 & 1923/2018 dated 22 October 2018 in the Free State High Court, Bloemfontein and that any dispute in terms of this agreement is not subject to the provisions of the Settlement Agreement as referred to.
- 17.10 This clause 17 is severable from the rest of this Agreement and shall remain valid and binding on the Parties notwithstanding the invalidity or any termination of this Agreement.

18. REPRESENTATIONS AND WARRANTIES

- 18.1 The Parties hereby represent and/or warrant that at the time of execution of this Agreement they have taken all necessary action to authorize their signatories to bind the Parties in terms of this Agreement.

19. GOVERNING LAW

- 19.1 The Agreement will be governed by and construed in accordance with the laws of South Africa.

20. NOTICES AND ADDRESSES

- 20.1 Any notice, notification, request, demand or other communication for any purpose under this Agreement shall be in writing addressed -
in the case of Eskom as follows :

120 Henry Street
Westdene
Bloemfontein
9300

marked for the attention of the PMO Lead (Maluti-a-Phofung Distribution Agency Agreement);

and in the case of the Municipality as follows :

Corner Moremohoho & Motlounge Street
Wetsieshoek
9870

marked for the attention of the Office of the Municipal Manager;

or to such other addresses, or for the attention of such other persons or department, as Eskom and the Municipality may from time to time notify to each other.

- 20.2 All notices, notifications, requests, demands or other communications, shall be deemed to have reached the other Party -
- 20.2.1 if delivered by hand, on the date of delivery;
 - 20.2.2 if posted by ordinary mail or registered post, on the 5th (fifth) calendar day following the date of such posting;
 - 20.2.3 if transmitted by facsimile or any other electronic medium acceptable to both Parties, on the 1st (first) Business Day following the date of transmission / publication / delivery.
- 20.3 For the purpose of this Agreement Eskom's *domicilium citandi et executandi* shall be:

Megawatt Park
Maxwell Drive
Sunninghill Ext. 3
2199 SANDTON

and the Municipality's *domicilium citandi et executandi* shall be:

Corner Moremohoho & Motlounge Street
Wetsieshoek
9870

Either Party may, by written notice to the other, change its abovementioned *domicilium*.

21. SEVERABILITY

- 21.1 In the event of any one or more of the provisions of this Agreement being held for any reason to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, and this Agreement shall be construed as if such invalid, illegal or unenforceable provisions were not a part of this Agreement, and this Agreement shall be carried out as nearly as possible in accordance with its original terms and intent.

22. IMPLEMENTATION AND EXIST PLAN

- 22.1 The Parties shall finalise the Implementation Plan on the commencement of this Agreement and the Exist Plan 6 (months) prior to the expiry of the period of this Agreement.

23. COMMUNICATION AND CONTACT PERSON

- 23.1 A list of the Parties' contact persons for or in respect to any matter that may arise from or in connection with this Agreement is attached hereto as Annexure C (*Contact Details*) and may be updated by the Parties as and when required.

24. PROCUREMENT PROCESSES

- 24.1 Subject to the availability of specific products and services, Eskom will to the extent possible, practical and implementable focus on black economic empowerment of suppliers or service providers from Free State when procuring products and services in terms of this Agreement.
- 24.2 All procurement in relation to the implementation of this Agreement shall be conducted by Eskom in accordance with the provisions of the Constitution and the Applicable Laws.

25. STAKEHOLDER ENGAGEMENTS

- 25.1 The parties shall jointly develop and implement a public participative process by which notice will be given to Customers, the Municipality employees, organised labour, and other relevant stakeholders on the implications of the terms of this Agreement and its implementation.

SIGNED for and on behalf of the **Municipality** by the signatory below who warrants that he/she is duly authorised.

Date: _____

Name:

Title:

As Witnesses :

1. _____ 2. _____

SIGNED for and on behalf of the **Eskom** by the signatory below who warrants that he/she is duly authorised.

Date: _____

Name:

Title:

As Witnesses :

1. _____ 2. _____

ANNEXURE A

SCOPE OF SERVICES TO BE PROVIDED BY ESKOM AND THE MUNICIPALITY

PART A: RETAIL SERVICES

- Pre-Implementation
 - Industry Support and Stakeholder Management together with the Municipality's communication will engage external media on the progress of this Agreement.
 - The Municipality to complete the public participation process – Eskom will provide any support required.
 - Registration of Supply Group Code and creation of CIS.
 - The Municipality shall provide existing customer data [conventional and prepaid] to Eskom.
 - Establish Vending Contract and negotiate with the Municipality's vendors the possibility to align to the Eskom vending footprint.
 - Assess the need for a meter reading contract.
 - The historical debt will be collected by the Municipality.
- Post Implementation:
 - Customers will be serviced according to the bylaws of the Municipality.
 - Interim face to face interactions with the Municipality's customers until self-service technology become available.
 - Eskom will provide a suit of retail service e.g., credit management, new applications, upgrades, and downgrades, vending issues, customer education etc.
 - Automated meter reading and billing of commercial [conventional] customers.
 - An Energy Losses audit report, which will include tampers and illegal connections, will be generated.
 - Those consumers found to be illegal users of electricity shall be disconnected and a remedial charge in line with the Municipality's policy shall apply.
 - Eskom will, monthly, provide the Bulk Electricity Account to the Municipality.
 - Eskom to pay the output VAT monthly to the Municipality.
 - Commercial Customer Communication:
 - Commercial Customers shall be managed by the Parties in so far as Metering is concerned in terms of section 95 of the Municipal Systems Act (where applicable) and NRS047 part 2 as per license conditions of the Municipality. A mechanism to be agreed on how the complaint reporting is managed.
 - Annual Tariff Compilation
 - Eskom will assist and advise on request of the Municipality in the compilation of cost reflective tariffs as part of the annual electricity tariff application to NERSA.

**PART B: ELECTRICAL ASSET CREATION, MAINTENANCE AND OPERATION NETWORK
ENGINEERING SERVICES:**

- Services include maintenance, infrastructure development (strengthening, refurbishment and normalisation) of the high voltage, medium voltage, and low voltage Municipal Networks
- Install and/or replace all post-paid/conventional and prepaid meters.
- Respond and attend to all faults on the Municipal Network.
- Commissioning of new electrical infrastructure installations and electrification projects.
- Conduct the process of termination, reconnection, and disconnection of non-paying or tampering Customers.
- The Municipality shall comply to all statutory and regulatory requirements
- Review of electrical master/network development plan
- Implementation of planned electrification programme
- Processing of customer supply requirements

PART C: FINANCIAL SERVICES:

- Eskom would compile and submit a section 71 of MFMA report within 7 working days (the budget information) to the Municipality.
- The required general ledger, and journal information will be provided as per Eskom SAP month end reporting deadlines.
 - Monthly reconciliations and reporting (as per SAP).
 - Ringfenced costs in relation to project monthly spend.
- Share the five-year cash flow model.
- Cost projections within cost to serve to be provided by streams to Finance with a 75% confidence level.
- A breakdown of the cost to serve assumptions will be provided to on a monthly basis monthly influenced by the various cost projections.
- Ensure Eskom's budget for the project is managed within the relevant Delegation of Authority.
- The Municipality shall provide the debtor's book for all services.
- Eskom shall charge a 10% handling fee will be charged towards for the Services rendered.
- All assets built, strengthened, or refurbished will be capitalized and insured by the Municipality.

PART D: SUPPORT SERVICES

In addition to the human resources and financial services, information technology, safety, health, environmental and quality services, the following administrative services shall also be provided:

- a. Project and contract management
 - i. Eskom will furnish the Municipality with content which the Municipality will be required to communicate on behalf of Eskom to Commercial Customers on all customer related matters.
- b. Regulatory Communication
 - i. The regulatory communication in terms of the applicable section in the Municipal Systems Act and MFMA must be done by the Municipality. Where the necessary information is in Eskom's possession, Eskom will provide same to enable the Municipality to discharge its obligations
- c. Communication between Eskom and the Municipality
 - i. If Eskom has to embark on any necessary shutdown project for any reason whatsoever, including delays thereof, Eskom will be required to communicate that to the Municipality.
- d. Eskom Information Technology:
 - i. Eskom will assess MaP Information Systems.
 - ii. Eskom will ensure that billing of MaP customers be automated.
 - iii. Acquiring of assets [laptops, desktops etc] will be assess by Eskom information systems for seconded employees.

PART E: TECHNICAL SERVICES TO BE PROVIDED BY THE MUNICIPALITY

- The MUNICIPALITY shall continue to provide the following services:
 - installation and maintenance of high light masts.
 - installation and maintenance of streetlights.
 - installation and maintenance of traffic lights; and
 - maintenance of all existing Municipal buildings services

PART F: IMPLEMENTATION PLANS

- A Project Management Office (PMO) will oversee the implementation of the the DAA and all work streams from both Eskom and MaP will report to the PMO progress with implementation of the DAA.

ANNEXURE B

ROLES AND RESPONSIBILITIES

1. Eskom, in its capacity shall:
 - 1.1 control and direct the means, manner, and method by which the Services required under this Agreement shall be performed;
 - 1.2 apply the Municipality's revenue collection and recovery process as per the applicable municipal by-law;
 - 1.3 source full-time contractors or use its employees and/ or the Municipality to provide the Services required by this Agreement;
 - 1.4 identify an Eskom Contract Manager, prior to signature of this Agreement, to manage the contract;
 - 1.5 assist the Municipality's vendors to partner with the accredited vendors on the national Eskom vending contract;
 - 1.6 ensure that all Occupational Health and Safety Act requirements pertaining to the Services are met;
 - 1.7 provide a project Implementation and Execution Plan, prior to signature of this Agreement; and
 - 1.8 audit all supply installations to identify illegal connections, meter tampering and non-metered supply points.
2. The Municipality agrees to:
 - 2.1 allow Eskom to apply for and manage the entire process, on behalf of the Municipality, future electrification projects, including but not limited to applying or requesting for funding from the Department of Minerals and Energy;
 - 2.2 during the transition period when Eskom installs a new Smart Meter, before removing the existing meter, the units on the Customer's meter will be recorded and the Municipality shall reimburse the Customers' units;
 - 2.3 during the transition period when Eskom installs a new post-paid meter, before removing the existing meter, the closing reading on the Customer's meter will be recorded and the Municipality shall the CUSTOMER with the final electricity account;
 - 2.4 ensure that the necessary engagement processes with its customers and other stakeholders are undertaken, prior to the commencement of this Agreement;
 - 2.5 ensure that all Customers' information is made available to Eskom in the required format for capturing information in accordance with the Protection of Personal Information Act 4 of 2013; prior to the commencement of this Agreement;
 - 2.6 provide Eskom with a list and details of all existing contracts pertaining to the electricity ring-fenced business;
 - 2.7 ensure that all Occupational Health and Safety Act requirements pertaining to the installation, maintenance and operation of the Municipality's network are met;
 - 2.8 The Municipality shall pay the FBE account monthly into Eskom's bank account in terms of the provisions of the Free Basic Electricity Agreement.

- 2.9 continue to provide a fault reporting services to its Customers regarding electricity related faults and report all network and meter installation related faults to Eskom during the transition period
- 2.10 inform all Customers to report all fault related matters, to the Eskom Contact Centre on 0860 037 566 or through the various digital platforms offered by Eskom;
- 2.11 grant Eskom permission to access its Customers' premises and municipal buildings and networks; and
- 2.12 provide Eskom with all Customer and network data including geo-spatial drawing and line diagrams; and
- 2.13 grant permission, through a council resolution and obtain approval from National Treasury, for Eskom to carry out the Services on behalf of the Municipality in accordance with the Electricity Supply Agreement and this Service Delivery Agreement.

ANNEXURE C

CONTACT DETAILS

	Maluti a Phofung	Eskom
Principal Contact		Brenda Cebekhulu +27 31 710 5724 CebekhBN@eskom.co.za
Stream Leads	Maluti a Phofung	Eskom
Maintenance and Operations		Lucas Mazibuko +27 51 404 2416 MazibuKL@eskom.co.za Reggie Moleko +27 51 404 2115 MolekoR@eskom.co.za
Project Lead		Andre Damons 051 404 Elsebe Ledimo 051-4042747 LedimoE@eskom.co.za
Customer Services		Bibi Bedir +27 51 404 2684 NoorbhFB@eskom.co.za Eugene Myburgh +27 51 404 2551 MyburgEC@eskom.co.za
Asset Creation		Emmanuel Mokalanyane +27 51 404 2226 mokalale@eskom.co.za
Information Technology		Shareen Pillay +27 31 710 5148 SukaiS@eskom.co.za
Human Resources		Angelique Kemp +27 11 800 3774 KempA@eskom.co.za
Legal		Hendrick Thwala +27 11 800 6368 ThwalaH@eskom.co.za

ANNEXURE D

MERIT ORDER

Revenue Collected from Customers shall, in accordance with the Merit Order, be allocated as follows:

1. Current account
2. Cost to serve
3. Capital Expenditure
4. Arrear Debt. Receipts to be applied first against debt for which there is no judgment and lastly against judgment debt.

Eskom's Bank Account:

Account Holder: Eskom Holdings SOC LTD
Bank: First National Bank
Branch Code: 223 626
Bank Account Number: 55 070 067 316

ANNEXURE E

LIST OF SECONDED EMPLOYEES